JOSEPH L. BUSH
BETTY BUSH

IBLA 83-260 Decided March 23, 1983

Appeal from decision of Fairbanks District Office, Bureau of Land Management, declaring unpatented mining claim abandoned and void. F 26122.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

2. Mining Claims: Recordation -- Regulations: Generally --Regulations: Interpretation

   Where it benefits the affected party to do so, a mining claim recordation regulation which is amended while the matter is pending may be applied in its amended form only where there are no intervening right which will be adversely affected.

APPEARANCES: William Bixby, Esq., Valdez, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Joseph L. Bush and Betty Bush appeal the December 2, 1982, decision of the Fairbanks District Office, Bureau of Land Management (BLM), which declared the unpatented G & G Boulder Creek No. 2 placer mining claim, F 26122, abandoned and void because the evidence of the annual assessment work had not been filed on or before December 30, 1981, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2-1. The evidence of assessment work was received January 4, 1982.

Appellants argue that the requirements of section 314(a) of FLPMA, 43 U.S.C. § 1744(a), and of 43 CFR 3833.2-1 violate the Equal Protection Clause of the 14th Amendment to the Constitution because persons living in the vicinity of the Fairbanks District Office have more time to file than those who are residents of remote areas and have to use the mails for delivery of their filings. Because of the disadvantage to those who live long distances from the BLM offices, the statute and regulations are unconstitutional and cannot be used to forfeit the appellants' mining claim.

Appellants further argue that the Government is estopped from asserting forfeiture of their mining claim by the doctrine of laches. The proof of labor was received by BLM on January 4, 1982, but no notice of forfeiture of the mining claim was given until December 2, 1982, after appellants had expended both labor and money doing the 1982 assessment work on their claim.

Counsel for BLM responded, saying that the Board is not the proper forum for determining constitutional claims. Marvin E. Brown, 52 IBLA 44 (1981). Counsel also asserted that a sufficient claim for estoppel has not and cannot be alleged. United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978). Counsel questions whether the change in the mining claim recordation regulations published in 47 FR 56,300-56,307 (Dec. 15, 1982), to be effective December 30, 1982, can be applied retroactively to benefit appellants, citing the Departmental policy that an amended regulation may be applied to a pending case if it is beneficial to the applicant and where there are no countervailing public interest considerations or intervening rights. James E. Strong, 45 IBLA 386 (1980). Counsel states there is an intervening right in the application, F 43788, of the State of Alaska to select the land in the mining claim under the Alaska Statehood Act and that pursuant to section 906(e) of the Alaska National Interest Lands Conservation Act, the State's application is now an intervening right precluding application of the amended regulation to the benefit of appellants.

Although the proof of labor was mailed from Valdez, Alaska, on December 30, 1981, the regulations in effect at that time defined "file" to mean "being received and date stamped by the proper BLM office." 43 CFR 3833.1-2(a). It was not possible for the Postal Service to effect delivery of the envelope to the BLM office in Fairbanks, Alaska, on that date. Under the former regulations, the Board has repeatedly held that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility for and bear the consequences of untimely delivery of his filings. Don Chris A. Coyne, 52 IBLA 1 (1981); Edward P. Murphy, 48 IBLA

211 (1980); Everett Yount, 46 IBLA 74 (1980). Under the regulations in effect December 30, 1981, filing was accomplished only when a document is delivered to and received by the proper BLM office. Depositing a document in the mails did not constitute filing.

[1] Section 314 of FLPMA requires that the owner of an unpatented mining claim located on public land shall file with the proper office of BLM before December 31 of each year a proof of labor or notice of intention to hold the mining claim. The statute also provides that failure to file such instruments within the prescribed time period shall be deemed conclusively to constitute an abandonment of the mining claim. As the proof of labor for 1981 was not received by December 30, 1981, BLM properly deemed the claim to be abandoned and void. Mermaid Mining Co., 65 IBLA 172 (1982); Kivalina River Mining Association, 65 IBLA 164 (1982); Margaret E. Peterson, 55 IBLA 136 (1981). The responsibility for complying with the recordation requirements of FLPMA rests with the owner of the unpatented mining claim. This Board has no authority to excuse lack of compliance, or to extend the time for compliance, or to afford any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate without the regulations. See Northwest Citizens for Wilderness Mining Co. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Lynn Keith, supra at 196, 88 I.D. at 371-72.

As to the constitutionality of FLPMA, this Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an Act of Congress is constitutional. Old Hundred Gold Mining Co., 63 IBLA 56 (1982); Lynn Keith, supra. Jurisdiction of such an issue is reserved exclusively to the judicial branch. However, to the extent that the recordation section of FLPMA has been considered by the appellate courts, it has been upheld. See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

The argument of appellants that estoppel lies cannot be sustained. As the Ninth Circuit stated in United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978): The ordinary elements of estoppel are (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. It cannot be shown that the situation here presented contains these four elements.

As to the charge of laches, we repeat what the Board said in Maud H. Goehring Conway, 69 IBLA 91, 94 (1982):

> It is unfortunate that BLM did not take earlier action to notify claimants of the deficiency in their filings. However, the authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. Reliance upon information or opinion of any officer, agent, or employee, or on records maintained in BLM offices cannot operate to vest any right not authorized by law. 43 CFR 1810.3.

Although, as counsel for BLM pointed out, the regulation 43 CFR 3833.05(m) was amended effective December 30, 1982, to provide that the mailing of an annual proof of labor on or before December 30 would be considered compliance with 43 CFR 3833.2-1 if received by the proper BLM office by January 19, in an envelope bearing a clearly dated postmark, such amendment may not be applied retroactively to benefit these appellants because the selection application of the State of Alaska is an intervening right which attached when the proof of labor for 1981 was not timely filed with BLM. Section 906(e), Alaska National Interest Lands Conservation Act, 94 Stat. 2439.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

R. W. Mullen
Administrative Judge

Will A. Irwin
Administrative Judge